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In The

# Supreme Court of the United States

RICHARD A. VERNON, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION; DAVE PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, WARDEN, ISCI,

*Petitioners,*

v.

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

I. RESPONDENTS' ARGUMENT THAT BOB JONES WAS THE VICTIM OF A CAMPAIGN OF RETALIATION MISSTATES THE RECORD ..... 2

II. RESPONDENTS' CONTENTION THAT JONES RESIGNED FROM HIS JOB BECAUSE OF HARM AND INTOLERABLE CONDITIONS IS NOT SUPPORTED BY THE RECORD ..... 4

III. *SANDIN v. CONNOR* APPLIES TO JONES' CLAIM ..... 5

IV. THE APPELLATE COURT'S DECISION CONFLICTS WITH THE LAW OF OTHER CIRCUITS ..... 7

V. PETITIONERS' ARGUMENT THAT JONES' COMPLAINTS WERE SUBJECT TO *SHAW v. MURPHY* ARE NOT BARRED BECAUSE THEY WERE NOT RAISED BELOW ..... 8

VI. JONES' ORAL COMPLAINTS ABOUT NELSON'S MANAGEMENT OF THE LAW LIBRARY WERE NOT ENTITLED TO SPECIAL PROTECTION BASED SOLELY ON THEIR CONTENT ..... 9

VII. THE APPELLATE COURT FAILED TO APPLY *TURNER v. SAFLEY* ..... 9

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

Page

CASES

*Bell v. Wolfish*, 441 U.S. 520 (1979) ..... 2

*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) ..... 8

*Hormel v. Helvering*, 312 U.S. 552 (1941) ..... 8

*Lewis v. Casey*, 518 U.S. 343 (1996) .....1, 5

*Meachum v. Fano*, 427 U.S. 215 (1976)..... 2

*Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995)..... 6

*Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985) ..... 6

*Rosenblatt v. Baer*, 383 U.S. 75 (1966) ..... 8

*Sandin v. Connor*, 515 U.S. 472 (1995).....5, 6

*Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475 (2001) .....2, 8, 9, 10

*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) ..... 4

*Thaddeus X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) ..... 5

*Turner v. Safley*, 482 U.S. 78 (1987) .....2, 8, 9, 10

*United States v. United Food, Inc.*, ___ U.S. ___, 121 S.Ct. 2334 (2001)..... 8

CONSTITUTIONS, STATUTES, AND RULES

United States Constitution, Article III § 1 ..... 5

United States Constitution, Article III § 2 ..... 5

## INTRODUCTION

Respondents' brief in opposition to the Petition for Writ of Certiorari underscores why the Court should undertake review of the issues raised in that Petition. The Response includes a number of factual assertions which are not supported by the record. The Court is now presented with three factual scenarios: (1) The actual record, in which the Magistrate concluded that the only retaliation against Bob Jones was two attempted, but failed, transfers; (2) the Appellate Court's version, which includes a finding not made by the Magistrate that Jones quit his job because of a chilling effect; and (3) Respondents' version which now includes a two year "campaign" of retaliation against Jones that, according to the Magistrate, never happened. Adoption of the objective "person of ordinary firmness" test urged by Petitioners, or, for that matter, the "atypical and significant hardship" test urged by the Amici, would make the task of sifting through such conflicting interpretations of the facts unnecessary.

Instead, a court dealing with a retaliation claim would begin its inquiry by examining what type of injury the prisoner claims to have suffered. Where, as here, the alleged injury was not one that would deter a "person of ordinary firmness" from pursuing his constitutional rights, or, as urged by Amici, one that constituted an "atypical and significant hardship" in the prison context, the inquiry would end and the case would be dismissed. The unnecessary entanglement of federal courts in the affairs of state prisons which has been the subject of repeated cautions by this Court, would be avoided. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is for the courts to provide relief for claimants . . . it is the role of

the political branches of the State and Federal Governments to manage prisons"); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (recognizing that "day-to-day prison operations are consigned to the executive, not the judiciary"); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976) (cautioning against involving the judiciary "in issues and discretionary decisions that are not the business of federal judges").

Respondents urge the Court to ignore the intervening change in law presented by *Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475 (2001). The Court should not do so. Jones' speech was not entitled to special protection based solely on its content so as to avoid the application of the "unitary deferential standard for reviewing prisoners' constitutional claims" which was set forth in *Turner v. Safley*, 482 U.S. 78 (1987), as required in *Shaw*, 121 S.Ct. at 1479.

Petitioners will now address the new points raised by Respondents in the order in which they were presented.

## I. RESPONDENTS' ARGUMENT THAT BOB JONES WAS THE VICTIM OF A CAMPAIGN OF RETALIATION MISSTATES THE RECORD.

Respondents argue that Jones suffered injury because he was the victim of a "relentless" two year campaign of retaliation by Michelle Nelson, during which she fired him from a job, attempted at least three times to transfer him, falsely accused him of theft and fraud, and interfered with his criminal appeal. Response at 9-10. This argument, which attempts to bolster Jones' injury claim with allegations that were never proven at trial, is itself a recognition of the *de minimis* nature of that claim.

A reply to this argument must take into account the manner in which the Magistrate dealt with claims of retaliation which Respondents alleged but failed to prove. The Magistrate stated at the beginning of his Findings of Fact:

> . . . to the extent the Court had concluded that the evidence in the record does not support certain instances of retaliation alleged by Plaintiffs to have occurred, they will not be included in the Court's Findings of Fact or otherwise referenced herein. In the event an incident or series of actions are not contained in these Findings of Fact, it is not an oversight or unintentional omission. Rather, the failure to mention an event or series of events in these Findings is an indication that the evidence does not support a finding of retaliation or other violation of Plaintiff's protected rights.

App. at 48. Simply stated, if the Magistrate's Findings of Fact don't mention it, it was not retaliation.

The Magistrate's Findings do not mention Respondents' claims that Nelson fired Jones from a job at IMSI in 1996, that she had him transferred from IMSI (a maximum security prison) to ISCI (a medium security prison) in March 1996, that she denied Jones access to his legal materials, and that she impaired his ability to assist in his defense in a pending appeal. Response at 4-5. These actions were not, then, retaliatory and they cannot be considered in determining whether Jones suffered an injury.

## II. RESPONDENTS' CONTENTION THAT JONES RESIGNED FROM HIS JOB BECAUSE OF HARM AND INTOLERABLE CONDITIONS IS NOT SUPPORTED BY THE RECORD.

Respondents contend that Jones resigned from his law library job in July 1997 because "he believed that he was doing himself harm by staying under Nelson's supervision." Response, p. 9. Respondents suggest that his working conditions were "so intolerable" that he had "no option but to resign," citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

To the contrary, the Magistrate did not find that Jones was harmed, or that he believed he was being harmed, or that his working conditions were intolerable. The Magistrate found that Jones "determined that his work in the law library, especially being under CLLS Nelson's supervision, was detrimental so on August 1, 1997, he tendered his resignation," but that he nonetheless worked for Nelson until August 15, 1997. App. at 57. Jones initially explained that:

> . . . it just seemed to me that there wasn't any use in my staying there. And actually, I was doing myself harm, because I was underneath her supervision.

App. to Reply at 2. He later admitted that this "harm" was no more than his dislike of Nelson's supervision, and that he also had another reason for quitting:

> Q. And why did you leave?
>
> A. Because I just didn't want to be subject to her control any more.
>
> Q. Wasn't it because you had just gotten ready to file a lawsuit against Michelle Nelson?
>
> A. Well, that was part of it, yes.

App. at 93. Jones went on to state that he "didn't think it was fair to her to be in her employ" once he had filed that lawsuit. App. at 94. It is absolutely clear that Jones quit his job because he did not like having Nelson as a supervisor and he wanted to sue her. Those may be perfectly good reasons for quitting a job, but they are not injuries sufficient to establish standing under Article III of the United States Constitution.

## III. *SANDIN v. CONNER* APPLIES TO JONES' CLAIM.

Respondents seek to avoid the application of *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293 (1995) to this case by suggesting that Petitioners are trying to fit a round peg in a square hole in applying *Sandin*'s due process analysis to this retaliation case. Response at 3, 10-11. This oversimplifies and misconstrues Petitioners' argument.

Petitioners argue that the lower courts' decisions were inconsistent with the entire scope of this Court's standing precedent, and more particularly, with precedent in prison cases such as *Sandin*, all of which required that a plaintiff have suffered an identifiable injury. In contrast, the lower courts granted and affirmed relief in the absence of identifiable injury. The lower courts' decisions are out of step with the entire scope of standing precedent, including *Sandin* and *Lewis*.

*Sandin* is relevant in two additional respects.

First, Ohio and other Amici now urge the Court to adopt *Sandin*'s "atypical and significant hardship" standard in the retaliation context, while Petitioners urge adoption of the "person of ordinary firmness" test, as set forth in *Thaddeus X v. Blatter*, 175 F.3d 378 (6th Cir. 1999). While the respective arguments of Petitioners and Amici take different conceptual approaches, both urge the Court

to adopt an objective test that would eliminate claims based on wholly subjective and factually unsubstantiated injuries. Adoption of the "person of ordinary firmness" test advocated by Petitioners is thus entirely consistent with this Court's decision in *Sandin* in that both tests require an objective injury beyond a subjective chill.

Second, the Ninth Circuit itself has recognized that *Sandin* has application to retaliation cases. In *Pratt v. Rowland*, 65 F.3d 802 (1995), a retaliation case decided shortly after *Sandin*, the Ninth Circuit noted that while *Sandin* applied directly to due process cases, prisoners retained certain "other protections" from arbitrary state action, such as those guaranteed by the First and Fourteenth Amendments. 65 F.3d at 807, citing *Sandin*, 115 S.Ct. at 2302, n.11. *Pratt* held that Ninth Circuit retaliation law, in the form of cases such as *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985), fell within the category of the "other protections" mentioned in *Sandin*. *Pratt*, 65 F.3d at 806. However, *Pratt* went on to hold that future retaliation cases should be evaluated in light of the "general concerns expressed in *Sandin*," and in particular, *Sandin*'s admonishment to "afford appropriate deference and flexibility" to prison officials in evaluating proffered legitimate penological purposes for conduct alleged to be retaliatory. *Id.* at 807, citing *Sandin*, 115 S.Ct. at 2299.

The Ninth Circuit was correct in *Pratt*, but it did not go far enough. In addition to evaluating retaliation case with appropriate deference, this Court should set forth an objective standard of injury consistent with *Sandin*'s objective "atypical and significant hardship" test. Such a test is the "person of ordinary firmness" standard urged by Petitioners.

## IV. THE APPELLATE COURT'S DECISION CONFLICTS WITH THE LAW OF OTHER CIRCUITS.

Respondents argue that the Appellate Court's decision does not conflict with the law of other federal circuits because the Appellate Court did apply an objective test to determine whether Jones had been injured, and that the "chilling effect" found by the Appellate Court constituted an objective injury. Response at 11-12.

The law of the various circuits is reviewed at length at pages 12-17 of the Petition. In that light, it cannot reasonably be maintained that the Appellate Court's decision does not directly conflict with settled law in the Second, Third, Sixth, and D.C. Circuits, and that it is not in apparent conflict with the law in the Fourth and Fifth Circuits.

Furthermore, the "chilling effect" asserted by Respondents, if it existed, was wholly subjective. Respondents tacitly admit this when they argue that Jones quit his job because "*he believed* that he was doing himself harm." Response at 9 (emphasis added). Respondents argue that Jones' subjective belief that he was harmed is a sufficient basis for relief, regardless of whether he suffered any harm observable by anyone else. Under this approach, because Jones is the sole judge of what he believed, he becomes in effect the finder of fact. For Respondents, Jones' subjective state of mind trumps any objective proof. There is no room for a "person of ordinary firmness" in this equation, or, for that matter, for any person except Jones.

## V. PETITIONERS' ARGUMENT THAT JONES' COMPLAINTS WERE SUBJECT TO *SHAW v. MURPHY* ARE NOT BARRED BECAUSE THEY WERE NOT RAISED BELOW.

Respondents argue that Petitioners are barred from arguing that this Court's decision in *Shaw v. Murphy, supra,* applies to Jones' claims because Petitioners did not raise it below. Response at 13.

In support of their position, Respondents cite *United States v. United Food, Inc.,* ___ U.S. ___, 121 S.Ct. 2334 (2001). That case does not encourage the practice of raising new issues on appeal, but does not hold that a party can never raise such an issue. 121 S.Ct. at 2341. Contrary to Respondents' suggestion, this Court has considered issues on appeal which were not raised below when there was an intervening change in controlling case law. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Rosenblatt v. Baer,* 383 U.S. 75 (1966); *Hormel v. Helvering,* 312 U.S. 552 (1941).

The *Shaw* opinion was issued in April 2001, after this case had been submitted to the Appellate Court. *Shaw* held that the content of prison speech creates no special protection and that all prison speech is subject to the four-part *Turner v. Safley* analysis which is grounded on recognition of the unique difficulties inherent in prison management. *Turner,* 482 U.S. at 84; *Shaw,* 121 S.Ct. 1479. *Turner* and *Shaw* require appropriate deference to the prison authorities' assertion of a legitimate penological purpose. *Id. Shaw,* and thus *Turner,* should be applied to Jones' claim. Respondents' contention that *Shaw* should now simply be ignored should be rejected.

## VI. JONES' ORAL COMPLAINTS ABOUT NELSON'S MANAGEMENT OF THE LAW LIBRARY WERE NOT ENTITLED TO SPECIAL PROTECTION BASED SOLELY ON THEIR CONTENT.

According to Respondents, Petitioners argue that *Shaw* stands for the proposition that prisoners' complaints about a prison law library are "outside the ambit of First Amendment protection." Response at 14. This is not the position held by Petitioners.

Petitioners do not argue that *Shaw* holds that prisoners' complaints are entitled to no protection. Petitioners do argue that, under *Shaw*, Jones' speech was not deserving of such a high level of protection as to avoid the *Turner* analysis. As this Court recognized in *Shaw*, no special protections are granted to prison speech based solely upon its content. *Shaw*, 121 S.Ct. at 1479-80. But, the Magistrate found just such a special protection when he held that "complaints regarding the operation of a prison law library are *unique* in the prison context for purposes of this instant action." App. at 57 (emphasis added). The Magistrate elevated Jones' complaints to a level deserving greater protection than other types of prison speech, including, apparently, speech about medical issues, conditions of confinement, use of force and other important issues. The Appellate Court compounded this error by accepting the Magistrate's analysis. App. at 15.

## VII. THE APPELLATE COURT FAILED TO APPLY *TURNER v. SAFLEY*.

Respondents contend that the Magistrate did actually apply the *Turner v. Safley* analysis, because it was mentioned in his decision. Response at 14-15. Respondents' argument is based on the fact that the Magistrate quoted

*Turner* in a portion of his decision that was devoted to a general summary of the law of retaliation. App. at 40-41. There is a difference between applying a legal standard and merely mentioning it as a part of a survey of the underlying law. The conclusion that the Magistrate applied *Turner* to Jones' claim does not necessarily follow from the fact that he demonstrated his familiarity with it. A review of the Magistrate's decision reveals that he did not apply *Turner* to Jones' situation. In the face of considerable evidence that the cancelled transfer of Jones to Louisiana was grounded in legitimate penological purposes, the Magistrate did not defer but instead found the proffered reasons for the transfer pretextual and decided the attempted transfer was retaliatory. The Appellate Court affirmed, also failing to apply, or even mention, *Shaw* and *Turner*.

## CONCLUSION

Based on the reasons set forth in the Petition and those set forth herein, Petitioners respectfully urge the Court to grant their Petition.

Respectfully submitted,

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| NOEL GOMEZ, et al,<br>Plaintiffs,<br>vs.<br>RICHARD VERNON, et al,<br>Defendants. | ) | Docket No.<br>CV-91-0299-S-LMB<br>Boise, Idaho<br>February 19, 1998<br>8:00 a.m. |

COURT TRIAL - DAY 9

THE HONORABLE LARRY M. BOYLE PRESIDING
UNITED STATES MAGISTRATE JUDGE

| COURT RECORDER: | TRANSCRIPTION BY: |
|---|---|
| VICKI JONES<br>U.S. District Court | NORTHWEST TRANSCRIPTS, INC.<br>P.O. Box 890<br>Nampa, Idaho 83653-0890<br>(208) 466-2743 |

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

* * *

JONES - DIRECT

[38] with this. And I said, I know for a fact – well, by then I was so angry that I said to her, I know for a fact that you tried to transfer me to Orofino. And she said, yeah, I did, but I didn't have anything to do with this Louisiana move. I said, well, I'm not sure that I believe you. It

seems like every time I get around you, I get transferred or rolled up, or something happens.

And we left it at that, because I wasn't getting anywhere and I didn't really want to get in trouble over it.

Q Did there come a time when you –

A Oh, she showed – I'm sorry – she showed me the list, the move list, and said, look, you weren't even on the move list, how could I have anything to do with this, and she showed it to me.

Q Did you, thereafter, get any information about what had happened between the time you first spoke to Barrier and the time that he came back and told you that you weren't going to be transferred?

A One of the other law clerks, I believe it was Marq Bartlett, told me that he had called Steven, and Steven had called Mr. McNeese, and McNeese had, at Steven's insistence, had intervened.

Q Steven Pevar?

A Pevar.

Q Did there come a time when you stopped working as a law [39] clerk at ISCI?

A Well, after that episode – after that episode, that was in July, and within a couple of weeks it just seemed to me that there wasn't any use in my staying there. And actually, I was doing myself harm, because I was underneath her supervision. So, I turned in my resignation on the 1st of August and I left on the 15th.